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LOW YIEN KWEE & ORS

v.

EVER NOBLE SDN BHD

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HIGH COURT MALAYA, PULAU PINANG
BALIA YUSOF WAHI J
[CIVIL SUIT NO: 22-753-2006]
10 MARCH 2008

C ***LEGAL PROFESSION:*** *Professional discipline - Legal Profession (Practice and Etiquette) Rules 1978 - Allegation of breach of rr. 3, 4, 5 and 43 - Whether sufficient evidence produced by complainant to prove breach - Whether advocate and solicitor had volunteered advice to stir up strife and litigation - Whether conflict of interest had arisen*

D ***LEGAL PROFESSION:*** *Professional discipline - Legal Profession (Practice and Etiquette) Rules 1978 - Rule 28 - Application to disqualify advocate and solicitor under r. 28 - Whether advocate and solicitor will be a witness in respect of a material and disputed question of fact - Burden of proof on party seeking disqualification - Party applying for* E *disqualification cannot make general assertions - Sufficient material to be adduced to court - Fact that advocate and solicitor will be called as witness in unrelated case is irrelevant*

LEGAL PROFESSION: *Retainer - Authority - Allegation of lack of* F *authority of advocate and solicitor to act - Whether may be brought up as an issue in an unrelated suit*

CONSTITUTIONAL LAW: *Fundamental liberties - Right to counsel - Inherent power of court to refuse to permit a particular advocate and* G *solicitor from representing a particular individual - No absolute right to be represented by an advocate and solicitor of own choice*

The present suit was brought about by 74 individuals seeking specific performance of their sale and purchase agreements entered into with Ever Noble for the purchase of condominium units H developed by Ever Noble. Among these 74 individuals were the Committee Members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari ("the Persatuan") who were also among the defendants in Civil Suit 22-484-06 and 22-759-06 filed by Ever Noble. Ever I Noble applied (encl. 19) to disqualify the firm of solicitors of Messrs Cheong Wai Meng & Van Buerle ("the firm") from acting for the plaintiffs on the grounds that there was a likelihood that

solicitors from the firm would be made witnesses in the present suit and in suit no: 22-484-2006. Ever Noble also claimed that the firm had breached rr. 3, 4, 5 and 43 of the Legal Profession (Practice and Etiquette) Rules 1978 ("the Rules"), *inter alia*, on the following reasons: (i) that the firm had without authority entered appearance for the sixth defendant in Civil Suit No: 22-484-06; (ii) that the firm had advised the plaintiffs to disobey a consent order in suit No: 24-418-2001; (iii) that the firm had put itself in a situation of conflict being the 'unseen hands' as alleged in the complaint filed by Ever Noble to the Lembaga Tatatertib Peguam; and (iv) that the firm was a threat to Ever Noble and was full of hatred because of suit 22-759-06 filed by Ever Noble against the firm. The firm denied these allegations and contended that this application was an abuse of process which was aimed at delaying the plaintiffs' application under O. 81 Rules of the High Court 1980. A similar application had also been filed by Ever Noble in suit No: 22-484-2006 seeking to disqualify the firm from representing the Persatuan.

Held (dismissing the application in encl. 19 with costs):

(1) There was not an iota of evidence produced by Ever Noble to suggest that the firm and/or the partners had done the acts complained of. There was no evidence that the solicitors had volunteered advice to bring this action or to stir up strife and litigation. It was also not shown as to how the conflict of interest had arisen on the part of the firm. (paras 10 & 11)

(2) The authority to act for the sixth defendant in suit no: 22-484-06 had nothing to do with the present suit. The proper forum to ventilate the issue would be in that particular suit and not in the present suite. (para 12)

(3) If at all the firm's partner was to be called as a witness, he would have been called only in Saman Pemula 24-418-2000 and not in the instant case. Saman Pemula 24-418-2000 was totally a different case. There was no relevance in the objection to counsel appearing or representing the parties in that case to the present application. (para 16)

(4) In order for an advocate and solicitor to be disqualified under r. 28 of the Rules, it must be demonstrated that his appearance as a witness is in respect of a material and disputed question of facts. This has to be proved and the

burden lies on the party seeking for the disqualification. The affidavits filed in support of the application did not disclose what material and disputed question of facts that the advocate and solicitor would be required to testify as a witness. A party making an application for disqualification under the rule cannot make general assertions that the advocate and solicitor will be a witness in the case. There must be sufficient material for the court to consider whether in the particular circumstance of the case, the prohibition in r. 28 applies. (para 17)

(5) The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Similarly the right of a particular individual to be represented by an advocate and solicitor of his own choice is also not absolute. It is the court that will determine that right. (para 18)

Case(s) referred to:

Emperor v. Dadu Ramu AIR [1939] Bom 150 ***(refd)***

R v. Secretary of State for India In Council and Others, Ex parte Ezekiel [1941] KB 546 ***(refd)***

RS Muthiah v. Pembinaan Fiba Sdn Bhd [2004] 2 CLJ 917 HC ***(refd)***

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5(b)(ii), 28, 43

Rules of the High Court 1980, O. 81

For the plaintiff - SC Tan; M/s Cheong Wai Meng & Van Buerle

For the defendant - Surinder Singh; M/s Ong & Manecksha

Reported by Amutha Suppayah

JUDGMENT

Balia Yusof Wahi J:

[1] Enclosure 19 in this suit is an application by the defendant (hereinafter referred to as Ever Noble) to disqualify the plaintiff's solicitors Messrs. Cheong Wai Meng & Van Buerle from acting in the matter. The ground stated in the application in encl. 19 is that the firm of Cheong Wai Meng & Van Buerle and its solicitors (hereinafter referred to as the firm) has breached rr. 3, 4, 5 and

43 of the Legal Profession (Practice and Etiquette) Rules 1978 (hereinafter referred to as the Rules). Ever Noble is also seeking that the plaintiffs pay the cost of this application.

[2] To substantiate its ground, Ever Noble alleges that the firm in advising and representing the plaintiffs has caused the plaintiffs to disobey a consent order dated 9 September 2002 in respect of Saman Pemula 24-418-2001 in the High Court of Pulau Pinang. It is counsel's submission that the firm has encouraged the house buyers to disobey the said consent order and/or alternatively encouraged the spirit of the said consent order to be ignored. It is further submitted that the plaintiff's counsel has placed themselves in a position of conflict when they stand to be witnesses in a series of action in respect of the consent order and another action in suit no: 22-484-2006.

[3] Ever Noble's application in encl. 19 is supported by an affidavit in encls. 19 and 30. The acts of the firm and matters which Ever Noble alleges to be in breach of ethics of the profession and a breach of the law are as follows:

a) the solicitors of the firm has without authority entered appearance for the sixth defendant in Civil Suit No: 22-484-06.

b) the solicitors in the firm has advised the plaintiffs to disobey the consent order dated 9 September 2002 in suit No: 24-418-2001 and this is evident through suit No: 22-759-06 filed by Ever Noble against the firm together with some other parties.

c) the firm has put itself in a situation of conflict being the 'unseen hands' as alleged in the complaint filed by Ever Noble to the Lembaga Tatatertib Peguam.

d) the firm is a threat to Ever Noble and is full of hatred because of the suit 22-759-06 filed by Ever Noble against the firm and its partners.

[4] As for ground (a), Ever Noble has filed Civil Suit No: 22-484-06 against the Chairman and the Committee Members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari. The firm has entered appearance for all the defendants in that suit and Ever Noble claims that the firm has by so doing acted unprofessionally

and has breached the provisions of the Rules because one of the defendants, one Mr. Lim Keat Lee has not authorized or appointed the firm to act on his behalf. The said Mr. Lim Keat Lee has written to Messrs Ismail Khoo & Associates informing that he had never appointed the firm to act for him in the said civil suit. Ever Noble's counsel in the instant case has taken up the issue and has lodged a complaint to the Lembaga Tatatertib Peguam against the firm for acting without authority for the said Mr. Lim Keat Lee.

[5] As for ground (b), Ever Noble has filed an action in Civil Suit No: 22-759-06 against the firm and its solicitors together with 13 others as defendants. These 13 other defendants are the Committee Members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari. In its statement of claim against the said defendants, Ever Noble claims that the firm as advisors to the Committee Members has instigated and collaborated with the Committee Members to defile them and to disobey and disregard the consent order dated 9 September 2002. Having perused the statement of claim/writ in Civil Suit No: 22-759-06 it is evident that what Ever Noble is seeking is to injunct the firm from acting in conflict and/or conspiring against them. Putting it very simply, what essentially Ever Noble is doing is merely persuading the court to disqualify and/or prevent the firm from acting for those whom it represented in Suit No: 22-484-06. There is very strong resemblance and similarity in the relief sought against the Firm in Suit 22-759-06 and the present application.

[6] The present Civil Suit No: 22-753-2006 is brought about by 74 individuals who are the purchasers of the units of the condominiums known as Menara Kuda Lari which were developed by Ever Noble. Among these 74 individuals are the Committee Members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari who are also among the defendants Civil Suit 22-484-06 and 22-759-06 filed by Ever Noble. The 74 plaintiffs in the present suit are seeking for a relief of specific performance of the sale and purchase agreement entered with Ever Noble, vacant possession of the property and for a declaration that the defect liability period as mentioned in the agreement has not yet commenced. Counsel for Ever Noble submits that there is a likelihood that the solicitors of Messrs Cheong Wai Meng & Van Buerle will be made witnesses in the present suit and should therefore be disqualified from acting for the plaintiffs.

[7] In reply to Ever Noble's application, the firm through an affidavit filed by one of the plaintiffs denies all the allegations and the ground put forth by Ever Noble in seeking to disqualify them from acting for the plaintiffs. The firm contends that this application is an abuse of process which is aimed at delaying the matter in particular the hearing of encl. 2 which is an application by the plaintiff under O. 81 of the Rules of the High Court 1980. The plaintiffs further contend that a similar application to disqualify the firm has also been filed by Ever Noble in suit No: 22-484-2006 seeking to disqualify them from representing the Committee Members of the Persatuan Pembeli-Pembeli Rumah Kuda Lari. It is further submitted that the issues of embarrassment and breach of professional conduct as alleged does not arise in the circumstances and facts disclosed in this case.

[8] In my observation, the ground of objection raised by Ever Noble is centered essentially on the provisions of rr. 3, 4, 5 and 43 of the Rules. For ease of reference, it is pertinent to reproduce the abovementioned rules in toto which read as follows:

3. Advocate and solicitor not to accept brief if embarrassed

(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises -

(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

4. No advocate and solicitor to accept brief if professional conduct likely to be impugned

No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

A **5. No advocate and solicitor to accept brief if difficult to maintain professional independence**

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

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(b) (i) An advocate and solicitor who has at any time advised or drawn pleadings or acted for a party in connection with the institution or prosecution or defence of any suit, appeal or other proceedings shall not act, appear or plead for the apposite party in that suit, appeal or other proceedings.

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(ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting.

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43. Advocate and solicitor not to stir up strife and litigation

No advocate and solicitor shall volunteer advice to bring an action or to stir up strife and litigation.

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[9] It is elementary that in deciding whether the firm and solicitors has breached any of the above provisions, the whole facts and circumstances of the case must be closely examined. From the established facts, it is without doubt that there is a lot of legal tussle between Ever Noble and the purchasers of the units of the condominium developed by them and also with the Committee Members of the association representing the said purchasers. The firm of Cheong Wai Meng & Van Buerle is the solicitor representing those purchasers and the Committee Members. Up to the date of this judgment there are already three suits involving the parties here in the High Court of Penang. As can be seen in Civil Suit No: 22-759-06, the firm of Cheong Wai Meng & Van Buerle together with its solicitors has also been cited as among the defendants. On the ground of professional conduct likely to be impugned under r. 4, Ever Noble alleges that the firm and/or its solicitors has advised and investigated the house buyers to disobey and disregard the consent order in suit no: 24-418-2001. In pursuant of that, Ever Noble has filed civil suit no: 22-759-06 against the firm and the Committee Members of the association representing the purchasers. In that suit Ever Noble is

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seeking to injunct the firm and the partners from continuing their acts to conspire with the purchasers to disobey and sabotage the consent order. Further, Ever Noble is also claiming for costs, exemplary damages, damages for economic sabotage and a host of other forms of damages.

[10] Before me in this present application, there is not an iota of evidence produced by Ever Noble to suggest that the firm and/or the partners has done the acts complained of. Where is the conspiracy that is alleged and the sabotage plan that is harped on? It has to be shown how the professional conduct of the firm is likely to be impugned by taking up briefs in the instant case. The affidavits filed in support of this application do not provide the relevant evidence for this court to adjudicate on. The statement of claim against the firm in Civil Suit No: 22-759-06 does contain general averments and allegation of conspiracy and sabotage against the firm, but that is all. This in my view is insufficient to prove that rr. 4 and 43 of the Rules has been breached. There is also no evidence that the solicitors had volunteered advice to bring this action or to stir up strife and litigation.

[11] Speaking of professional independence, I would like to reiterate what I have stated in *R.S. Muthiah v. Pembinaan Fiba Sdn Bhd* [2004] 2 CLJ 917 to the effect that maintaining professional independence has always been the hallmark of an advocate and solicitor in handling a matter. It is for that reason that r. 5 has been legislated. Messrs. Cheong Wai Meng & Van Buerle represents the defendants in both Suit No: 22-484-06 who are the Committee Members of the Association representing the house buyers and also the defendants in Suit No: 22-759-06, the very same Committee numbers in Suit 22-484-06. In Suit No: 22-759-06 Messrs. Cheong Wai Meng & Van Buerle and the partners are also cited as defendants alongside the Committee Members. In the present suit 22-753-06, Messrs Cheong Wai Meng & Van Buerle is representing 74 plaintiffs comprising of the Committee Member and other purchases of the condominium units. Is there anything wrong or improper about that? It is beyond any reasonable minded person's comprehension to suggest that there is a conflict of interest or a breach of professional independence in the circumstances. It is the same people that the firm is representing

in all the three suits and the only difference is that the capacity of the parties represented are either as plaintiffs or defendants. Again, it is not shown as to how the conflict of interest has arisen on the part of the firm.

[12] Next, focusing on Ever Noble's objection on the ground that the solicitors of the firm has acted without the authority of one of the defendants in suit No: 22-484-06, Ever Noble must be having r. 5(b)(ii) of the Rules in mind. In respect of this ground, Ever Noble has also filed a complaint to the Lembaga Tatatertib Peguam as exhibited in exh. 'TSS2' of encl. 18, the affidavit in support of this application. With all due respect, I think to disqualify the solicitors from acting for the plaintiffs on this ground is misconceived. The authority to act in suit no: 22-484-06 has nothing to do with the present suit. The absence of authority to act in suit no: 22-484-06 is in respect of one Mr. Lim Keat Lee who was named as the 6th defendant therein. If at all this is an issue, the proper forum to ventilate the issue would be in that particular suit and not in the present suit here. The said Mr. Lim Keat Lee is not a party in the instant case. The issue of whether that amounts to a professional conduct likely to be impugned may be relevant elsewhere but certainly not in the present application.

[13] It is an established principle that lawyers should not act as counsel and witness in the same proceedings and this has been embodied in r. 28. It reads:

> **28. Advocate and solicitor not to appear in a case where he is a witness**
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> (a) An advocate and solicitor shall not appear in Court or in Chambers in any case in which he has reason to believe that he will be a witness in respect of material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his client's interests.
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> (b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.
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> (c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

[14] As Humpreys J stated in *R v. Secretary of State for India In Council and Others, Ex parte Ezekiel* [1941] KB 546:

> A barrister may be briefed as Counsel in a case or he may be a witness in a case. He should not act as both Counsel and witness in the same case.

[15] On this issue, counsel for Ever Noble submits that Mr. Tan Swee Cheng and Mr. Louis Van Buerle will be called as witnesses and he referred to exh. 'TSS2' p. 17 in encl. 30. Enclosure 30 is an 'affidavit tambahan defendan' filed in support of this application. Exhibit 'TSS2' contains an excerpt from the notes of proceedings in Saman Pemula No: 24-418-2000. The parties in the said saman pemula are U.G. Jayantha and Lim Beng Poh as plaintiffs suing in their own capacity and also for an on behalf of all the purchasers of condominium units in Menara Kuda Lari. The defendant is Ever Noble Sdn. Bhd. Exhibit 'TSS2' shows that Mr. Louis Van Buerle together with S.C. Tan and Kelly Tan appeared for the plaintiffs, Mr. Darshan Singh for the Receivers and Managers and Cik Daphne Choy for the defendant. The relevant part of p. 17 exh. 'TSS2' referred by the counsel reads as follows:

> Court to Mr. Darshan
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> Will your client be calling Mr. Louis Van Buerle as a witness?
>
> Mr. Darshan
>
> My clients will be calling him as a witness. I now apply orally for him to be disqualified from acting for the plaintiffs as counsel.

[16] From my reading of exh. 'TSS2', it is clear that if at all Mr. Louis Van Buerle will be called as a witness, he will be called only in that proceeding and not in the instant case. Saman Pemula 24-418-2000 is totally a different case. This court has no idea at all as to what the subject matter is in the said saman pemula. Neither has this court been appraised as to what is the outcome of that case. As such I am unable to see the relevance of the objection to counsel appearing or representing the parties in that case to the present application. There is no merit in the argument of counsel on this point.

[17] Similarly the learned counsel's submission that Mr. S.C. Tan will have to explain the complaint lodged against him on an alleged false affidavit filed by him in Suit no: 22-484-2006 will make him a witness is in my considered view also irrelevant in the instant case. Just because there was an objection against Mr. Louis Van Buerle in Saman Pemula 24-418-2000 and a complaint lodged against Mr. S.C. Tan to the Lembaga Tatatertib Peguam in respect of Suit no: 22-484-06 does not automatically mean that they ought to be restrained in the instant case. Each case must run on its own facts and circumstances. In my considered view, in order for an advocate and solicitor to be disqualified under r. 28 of the Rules, it must be demonstrated that his appearance as a witness is in respect of a material and disputed question of facts. This has to be proved and the burden lies on the party seeking for the disqualification. Upon considering the whole facts and circumstances of this case, I found that the evidence is lacking. The affidavits filed in support of this application in encls. 18 and 30 do not disclose what material and disputed question of facts that the advocate and solicitor would be required to testify as a witness in the present proceedings. A party making an application for disqualification under the said rule is not at liberty to make general assertions that the advocate and solicitor will be a witness in the case. There must be sufficient material for the court to consider whether in the particular circumstance of the case, the prohibition in r. 28 applies. In the circumstances of this case, I find that there is insufficient material to justify this court to deny the right of the advocate and solicitor from representing their clients in the instant case.

[18] The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Similarly the right of a particular individual to be represented by an advocate and solicitor of his own choice is also not absolute. It is the court that will determine that right. The reason for this limitation is well illustrated in the case of *Emperor v. Dadu Ramu* AIR [1939] Bom. 150 where it was stated by Beaumont LJ as follows:

> The question whether the Court has jurisdiction to forbid an advocate to appear in a particular case involve the consideration of conflicting principles. On the one hand an accused person is entitled to select the advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice merely by

> serving a subpoena on the advocate to appear as a witness. On the other hand, the court is bound to see that the due administration of justice is not in any way embarrassed. ... An advocate cannot cross-examine himself, nor can he usefully address the Court as to the credibility of his own testimony, and a Court may well feel that justice will not be done if the advocate continues to appear. But, in my opinion, the prosecution in such a case must establish to the satisfaction of the court that the trial will be materially embarrassed, if the advocate continues to appear for the defence.

[19] Before concluding, I must also address the submissions of the plaintiff's counsel on the issue of abuse of court process by Ever Noble. It has been submitted that the filing of this application is merely an attempt on the part of Ever Noble to stifle the proceedings, in particular the plaintiff's application under O. 81 of the Rules of the High Court. The plaintiffs also contend that there is a duplicity and multiplicity of proceedings filed by Ever Noble and this amounts to an abuse of the process of the court and could cause embarrassment to all parties involved including the court. As I have stated in the earlier part of this judgment, evidently there is a lot of legal tussle between Ever Noble and the purchasers of the Condominium and the Committee Members of the association representing these purchasers. The firm is representing and acting for these purchasers and Committee Members. While there may be in existence of no less then three civil suits between the parties here in the High Court of Penang, that by itself is no ground to hold that there is duplicity of proceedings, let alone an abuse of court process. In my view for the purposes of this application, this issue of duplicity and multiplicity of proceeding is irrelevant and it ought to be ventilated when the appropriate time comes, namely, at the hearing of this suit. For that reason, I need dwell no further on the subject matter and shall leave it to the discretion of the parties to pursue the matter at the appropriate time and occassion.

[20] In conclusion, for the reasons stated above, the application in encl. 19 is hereby dismissed with costs.